STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
January 21, 2003

No. 234919
Wayne Circuit Court
LC No. 00-011596

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant was charged with unarmed robbery, MCL 750.530, aggravated stalking, MCL 750.411i, and home invasion, MCL 750.110a.[1] Following a bench trial, defendant was convicted of aggravated stalking and unarmed robbery. He was sentenced as a third habitual offender, MCL 769.11, to two to five years' imprisonment for the aggravated stalking conviction, and 8 ½ to 30 years' imprisonment for the unarmed robbery conviction, to be served concurrently. Defendant appeals as of right. We affirm.

Defendant argues that the prosecution's comments during its rebuttal argument shifted the burden of proof and violated defendant's right to remain silent. We disagree. Since defendant failed to object to the prosecutor's comments, review of defendant's claim is for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

A prosecutor may not comment on a defendant's failure to testify or present evidence, but may argue that certain evidence is uncontradicted and may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte*, *supra*, 240 Mich App 721.

> "[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the

[1] The Felony Information states defendant was charged with third-degree home invasion. However, the description of defendant's alleged actions and the corresponding citation, MCL 750.110a(2), reference a first-degree home invasion charge.

> validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." [*Reid, supra,* 233 Mich App 478, quoting *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995)].

Defense counsel's closing argument asserted that there was no evidence that defendant broke into the dwelling with the intent to assault the victim. In response, the prosecution referenced testimony of statements defendant made at the time of the alleged home invasion and argued in rebuttal:

> Well, judge, what there is no evidence of is the fact that Mr. Williams is a liar. There is no, absolutely no evidence that he's a liar, so let's take him at his word.
>
> Let's take him at his word that that day September 29th when he forced [the victim] and her kids inside the house he was going to kill her. That's what he said, and we should take him at his word."

Here, the prosecution's "'argument on the inferences created [by defendant's theory] does not shift the burden of proof.'" *Reid, supra,* 233 Mich App 478, quoting *Fields, supra,* 450 Mich 115. Since defendant argued that he did not possess the requisite intent, the prosecution could respond to defendant's argument and assert that defendant had the requisite intent to break into a dwelling and assault the victim. Defendant's statements before and during his entry into the victim's dwelling are compelling evidence of his intent, and there was no misconduct in their use. The prosecution properly advanced its position that defendant's theory was not credible in light of his admissions adduced before trial.

For similar reasons, we reject defendant's argument that the prosecution's rebuttal comments violated defendant's right to remain silent. "[T]he prosecut[ion] may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt." *Fields, supra*, 450 Mich 111, quoting *United States v Robinson*, 485 US 25; 108 S Ct 864; 99 L Ed 2d 23 (1988). However, the prosecution may fairly respond to an argument of the defendant by commenting on that silence. *Fields, supra,* 430 Mich 111. Here, the prosecution's comments were a permissible "fair response" to defendant's argument that he lacked the requisite intent to assault the victim when entering the apartment. Because such evidence was admitted at trial, the prosecution was free to argue the evidence and all reasonable inferences arising from it as they relate to its theory of the case. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). Therefore, defendant has not established plain error affecting substantial rights, and this issue is accordingly forfeited. *Carines, supra,* 460 Mich 750.

Defendant next argues that the trial court demonstrated a lack of impartiality during the trial justifying the setting aside of his convictions. We disagree. Because defendant failed to object to the trial court's conduct, review of defendant's claim is for plain error affecting substantial rights. *Carines, supra,* 460 Mich 750.

A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *People v Hartsuff,* 213 Mich App 338, 349; 539 NW2d 781 (1995). A trial court may

question witnesses in order to clarify testimony or elicit additional relevant information, but the court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. MRE 614(b); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A court's questioning of a witness does not deprive the defendant of a fair trial if the questions are limited in scope, material to the issues in the case, posed in a neutral manner, and neither add to nor distort the evidence. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality, . . . a trial court is free to ask questions of witnesses that assist in the search for truth." *Id.* at 52. The record must be reviewed as a whole and portions of the record should not be taken out of context. *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988).

Defendant cites three incidents in support of his claim that the trial court pierced the veil of judicial impartiality. The first occurred toward the end of the prosecution's direct examination of the victim. The victim testified that she called defendant's probation officer, and the trial court asked the victim why she made such a call. Through a series of questions, evidence was introduced that defendant had been previously convicted of another crime committed against the victim of this case.

We conclude from our review of the record that the trial court's questioning of the victim was done in order to clarify her testimony. MRE 614(b); *Cheeks, supra*, 216 Mich App 480. The trial court's questioning falls within the wide discretion and power given to the trial court in the matter of trial conduct, particularly where the case was tried as a bench trial and the trial court served as a trier of fact. *Hartsuff, supra*, 213 Mich App 349; *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992). Moreover, defendant was not prejudiced by the trial court's questioning. A defense witness testified that she went to court in 1998 to testify for defendant when he was charged with assaulting the victim in this case with a dangerous weapon. Also, as part of the proofs on the aggravated stalking charge the prosecution introduced evidence of an order of probation that stated that defendant was not to have "contact whatsoever with the complainant." Thus, the trial court was aware of defendant's prior conviction regardless of its questions to the witness.

Defendant next claims that the trial court assumed the role of a second prosecutor in the courtroom because it told the prosecution not to rest its case. A trial court must not assume the role of prosecutor. *People v Sterling*, 154 Mich App 223, 229; 397 NW2d 182 (1986). The alleged instance occurred after the prosecution's final witness had testified. The prosecution then stated, "With that the people – no, the people don't rest." The prosecution stated it did not want to rest its case, and the trial court merely commented on the prosecution's initial uncertainty. From a plain reading of the record, the trial court did not encourage the prosecution to introduce additional evidence.

Defendant again claims that the trial court assumed the role of a second prosecutor in the courtroom when the trial court told the prosecution that it might want to reconsider its decision not to give a closing argument. We disagree. This incident is better characterized as an invitation to the prosecution by the trial court to make a legal argument that would permit the trial court to render an informed verdict. This invitation to give a closing argument was within trial court's discretion in the matter of trial conduct. *Hartsuff, supra*, 213 Mich 349. Moreover, the trial court's invitation to argue referenced the home invasion charge against defendant, a

charge on which ultimately the trial court acquitted defendant. Defendant has not established plain error affecting substantial rights, and therefore, the issue is forfeited. *Carines, supra,* 460 Mich 750.

Defendant next claims that the trial court improperly decided not to require the prosecution to produce an endorsed res gestae witness and instead instructed itself according to the "missing witness" instruction. We disagree. Since defendant did not object to the trial court's fashioning of a remedy, review of defendant's claim is for plain error affecting substantial rights. *Carines, supra,* 460 Mich 750.

Under MCL 767.40a(3), the prosecution is required to send defendant or his attorney a list of witnesses the prosecution intends to call at trial. These endorsed witnesses must be produced at trial unless successfully deleted from the prosecution's witness list pursuant to MCL 767.40a(4). *People v Wolford,* 189 Mich App 478, 483-484; 473 NW2d 767 (1991).

Janet Jones (Jones), was listed on the prosecution's list of witnesses it intended to call at trial. Jones did not appear at trial, and the prosecution asked the trial court to waive her testimony as cumulative to that of another witness. Defense counsel objected, arguing that Jones was a res gestae witness and would be important to the defense. The trial court then stated it would give itself an instruction as to that witness, presumably CJI2d 5.12, which permits the fact finder to infer that the missing witness' testimony would have been unfavorable to the prosecution. CJI2d 5.12.

Defendant argues that the trial court did not fulfill its promise to infer that Jones' testimony would have been unfavorable to the prosecution. We disagree. Trial courts are presumed to follow the law. *People v Farmer,* 30 Mich App 707, 711; 186 NW2d 779 (1971). Moreover, defendant's conviction for unarmed robbery related to events which Jones did not witness, and there was testimony from multiple witnesses concerning the aggravated stalking charge. In addition, the trial court acquitted defendant of the home invasion charge, finding insufficient evidence of intent to commit assault with a dangerous weapon. Jones was present during the event upon which this charge was based, suggesting that, at least for this offense, the trial court did infer that Jones' testimony would have been unfavorable to the prosecution on the issue of defendant's intent. Therefore, defendant has not established plain error affecting substantial rights, and the issue is forfeited. *Carines, supra,* 460 Mich 750.

Defendant's final claim is that several mistakes of his trial counsel denied him effective assistance of counsel. We disagree. Since there was no evidentiary hearing or motion for new trial before the trial court, this Court will consider defendant's contentions about defense counsel's performance only to the extent they are apparent on the record. *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike,* 228 Mich App 178, 181; 577 NW2d 903 (1998). Defendant must show, with regard to counsel's performance,

> "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders

> the result unreliable." [*People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002), quoting *People v Mitchell*, 454 Mich 145, 155-156; 560 NW2d 600 (1997).]

First, defendant argues that defense counsel was ineffective for failing to object to the prosecution's references to defendant having previously beaten the victim on several occasions. We disagree. Under MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence is admissible: 1) if it is relevant to an issue other than character or propensity, 2) if it is relevant to an issue or fact of consequence at trial, and 3) if its probative value is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994).

Defendant was charged with aggravated stalking, which is defined as stalking[2] committed in combination with one of the factors described in MCL 750.411i(2)(a)-(d). MCL 750.411i(2); see *People v Kieronski*, 214 Mich App 222, 233-234; 542 NW2d 339 (1995). In this context, evidence of other crimes, wrongs, or acts would be admissible to show the reasonableness of a complainant's sense of apprehension concerning the defendant and that the defendant engaged in a system or pattern of physical or mental abuse against the complainant. *VanderVliet*, *supra*, 444 Mich 74. Furthermore, there was no unfair prejudice because this case was tried before the trial court and it is unlikely (and there is no showing by defendant) that the trial court gave this evidence pre-emptive weight. *People v Harvey*, 167 Mich App 734, 746; 423 NW2d 335 (1988).

Defendant also argues that he was denied effective assistance of counsel because counsel admitted to elements of aggravated stalking and home invasion during his opening statement and offered no defense in his opening statement. A lawyer does not render ineffective assistance by conceding certain points at trial. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Here, while counsel's opening statement admission that defendant was at the victim's residence on the date charged in the information established elements of the aggravated stalking and home invasion charges, it also legitimized the subsequent argument that because he lived with and had never assaulted the victim, defendant could not be convicted of home invasion. Thus, defendant failed to establish a complete concession of guilt that would constitute ineffective assistance of counsel. *Id*.

Defendant argues that he was denied effective assistance of counsel because defense counsel was not prepared to defend the unarmed robbery charge. However, defense counsel argued that the victim had willingly given defendant money over a period of four months. The longevity of this relationship, defense counsel concluded, suggests that the victim was willingly giving money to defendant. This argument established a defense that, if believed, would have resulted in defendant's acquittal. Defendant has not shown that defense counsel was unprepared, and thus cannot establish the requisite prejudice. *LeBlanc*, *supra*, 465 Mich 578.

---

[2] "Stalking" is defined in MCL 750.411i(1)(e) as a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested."

Defendant also claims ineffective assistance of counsel based on counsel's failure to question police officers regarding his unarmed robbery conviction. "Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, there was no indication that the police officers had knowledge of defendant's unarmed robbery since it occurred before the September 29, 2000, incident to which they responded. Thus, the police officers could not have been questioned on this matter and counsel's performance was not deficient in this regard. *LeBlanc, supra*, 465 Mich 578.

Finally, defendant has not established cumulative errors that were prejudicial. Each of defendant's claims has been independently addressed, *supra*, and none have been found to have denied defendant a fair trial. Because no cognizable errors have been identified that deprived defendant a fair trial, there is no cumulative effect and reversal is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette